IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
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October Term, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents
BERT and CAROL VORCHHEIMER, guardians ad litem,
on her own behalf and on behalf of
all others similarly situated, *Petitioners*

v.

SCHOOL DISTRICT OF PHILADELPHIA AND
MATTHEW W. COSTANZO, Superintendent of the
SCHOOL DISTRICT OF PHILADEPHIA, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SCHOOL DISTRICT OF PHILADELPHIA AND MATTHEW W. COSTANZO, Superintendent of the SCHOOL DISTRICT OF PHILADELPHIA, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880; the Order of the United States Court of Appeals for the Third Circuit denying rehearing en banc has not yet been reported; both are set out in the Appendix of Petitioners at 1a-37a.

The Findings of Fact, Conclusions of Law, Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania are reported at 400 F. Supp. 326; they are set out in the Appendix of Petitioners at 38a-86a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether it is consistent with the Constitution and laws of the United States for a public school district to maintain, in a system otherwise coeducational, a limited number of single-sex schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Title IX of Public Law 92-318, 20 U.S.C. §§1681-1686, as amended, provides in pertinent part:

> §1681(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.

Title II of Public Law 93-380, 20 U.S.C. §§1701-1758 (Supp. 1976), provides in pertinent part:

> §1701(a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) the neighborhood is the appropriate basis for determining public school assignments.
>
> * * *
>
> §1703 No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> * * *

The Federal Rules of Civil Procedure, Rule 23 provides in pertinent part:

> RULE 23. CLASS ACTIONS.
>
> (a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common

to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

* * *

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . .

* * *

STATEMENT

Petitioner Susan Lynn Vorchheimer, then a junior high school student, sought admission to Central High School of the School District of Philadelphia. Central High School is one of two School District of Philadelphia (School District) senior high schools exclusively for the academically talented, the other being Philadelphia High School for Girls (Girls High School).

Since Central High School is for males and Girls High School for females, petitioner's application to Central High School was rejected by the Board of Education of School District. Petitioner instituted suit in the United States District Court for the Eastern District of Pennsylvania, in March, 1974, by her parents, Bert and Carol Vorchheimer, seeking an injunction preventing School District from denying her admission to Central High School, solely on the basis of her sex.

Although petitioners had styled this action as a "class action," and had moved the court for a determination of the class, to which motion School District responded, the court made no determination of the class prior to the judgment. No class action findings were made pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

Petitioners' Motion for a Preliminary Injunction, and the School District's response, were not ruled on by the court pending an adjudicatory hearing on the merits of the case.

A three-day, non-jury trial was held in May, 1975, and on August 7, 1975, the District Court issued its judgment, including Findings of Fact, Conclusions of Law, and an Order. The Order enjoined the School District from refusing to admit petitioner, or any other members of the class she represented, to Central High School, solely on the basis of sex.

The District Court made several findings with regard to the equality of Central High School and Girls High School. The court found that:

> In general, it can be concluded that the education available to the female students at Girls is comparable to that available to the male students at Central. (Fact number 30, 400 F. Supp. at 329.)

The court also found: "The courses offered at Girls are similar and of equal quality to those offered at Central." (Fact number 27, 400 F. Supp. at 329.) Finally, the court found that:

> Girls High was organized as an academic high school for females in 1893, having evolved from a school established in 1848 whose primary purpose was to train teachers for the Philadelphia public schools. While the school began by offering commercial, teacher training, and college-preparatory courses, the college-preparatory curriculum quickly overshadowed the other two. By 1910, Girls High was exclusively college preparatory. *It has fulfilled the vision of many nineteenth century educators, both men and women, by becoming the equal of Central in preparing its students for college.* (Emphasis supplied.) (Fact number 18, 400 F. Supp. at 328.)

At the trial of the cause, it was stipulated between the parties that "the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance," and that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." (Facts 32 and 33, 400 F. Supp. at 329). In addition, the School District presented substantial expert testimony on the value of single-sex education. (Facts 34 to 44, 400 F. Supp. at 329-31).

The District Court recognized that under the rational relationship standard, the above stipulations "would have proven fatal" to petitioners' case; the court also commented that "this Court would probably have felt compelled to

validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement." (400 F. Supp. at 335).

While the District Court found that under the "rational relationship" standard the School District's policy "would pass constitutional muster," (400 F. Supp. at 335), the District Court held that the School District failed to show that its policy of excluding females from Central High School bears a "fair and substantial relationship" to any of its legitimate objects. (400 F. Supp. at 333). The District Court refused to apply the rational basis standard here (which the court stated was met by the School District), although it found that *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), a case using that standard, "probably still represents good law as far as the exclusion of males from an all-girls' educational institution is concerned." (400 F. Supp. at 341, n. 5).

Petitioner was qualified for admission to Girls High School, which has admissions standards comparable to Central High School. (Fact number 24, 400 F. Supp. at 329). However, she chose not to apply for admission to Girls High School, and instead attended a coeducational comprehensive high school in her own neighborhood. The District Court found as a fact that graduates of the senior high schools of Philadelphia "have been and are accepted for matriculation by the best and most prestigious colleges and universities." (Fact number 25, 400 F. Supp. at 329). The Court of Appeals recognized that the comprehensive high schools of School District offer "a wide range of courses, including those required for college admission, and offer advanced placement classes for students who are intellectually able to progress at a faster than average rate." (532 F.2d at 881). At the senior high school attended, petitioner has been able to qualify for early admission to college at the end of the 11th grade. (532 F.2d at 882, n. 3).

The School District's application for a stay of the Order was denied by the District Court. On appeal, a stay was granted by the Court of Appeals for the Third Circuit, pending expedited appeal. Petitioners' application to vacate the stay was assigned to the panel of the Court of Appeals designated to hear the case on the merits, which panel in a two to one decision vacated the stay with regard to the named plaintiff but not as to the class she represents. Petitioner, however, decided not to attend Central High School and continued at the comprehensive senior high school, where she was then an 11th grade student.

The Court of Appeals for the Third Circuit in a two to one decision reversed the judgment of the District Court. The court adopted the findings of the District Court concerning the equality of Girls High School and Central High School, and stated that it was a fair summary of the parties' position that "the schools for boys and girls are comparable in quality, academic standing, and prestige." (532 F.2d at 882). Further, the Court of Appeals held that "the finding of the District Court discloses no inequality in opportunity for education between Central and Girls High Schools." (532 F.2d at 885).

The Court of Appeals reiterated the stipulations made in the District Court concerning the history and world-wide acceptance of educating the sexes separately. The court also noted that the Petitioners agreed that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." (532 F.2d at 882). Further, the Court of Appeals mentioned the findings of the School District's expert concerning the higher regard for scholastic achievement and increased time spent on homework among students in single-sex schools. (532 F.2d at 882). The decision of the court recognized the importance of these stipulations and findings:

> Equal educational opportunities should be available to both sexes in any intellectual field. However, the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools. While this policy has limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial. (532 F.2d at 887).

The District Court had noted that "the outcome of this case depends on which standard of review is applied." (400 F. Supp. at 334). In reversing the judgment of the District Court, the Court of Appeals held that under either the rational or substantial relationship tests "the regulations establishing admission requirements to Central and Girls High School based on gender classification do not offend the Equal Protection Clause of the United States Constitution." (532 F.2d at 888).

Although no allegation of any statutory violation was made in the Complaint, discussed by the District Court, or briefed by the parties, the Court of Appeals requested that the parties address themselves to certain statutory issues at the oral argument. The Court of Appeals reviewed the statutory issues, 532 F.2d at 883-885, and held that no statute forbade the existence of single-sex schools. (532 F.2d at 885).

The Court of Appeals denied a petition for rehearing en banc filed by Petitioners.

ARGUMENT

I. The Decision of the Court of Appeals Is Consistent With Decisions of This Court.

This Court has ruled on a case with factual and legal issues similar to the instant matter. In *Williams v. McNair, supra,* this Court upheld the exclusion of males from an all-female college. The Court of Appeals found that *Williams* "details a fact situation quite similar to that confronting us here, except that the plaintiffs were males who sought admission to a girls' state college," and held that *Williams* had "precedential weight." (532 F.2d at 887).

Indeed, the District Court found *Williams* "probably still represents good law," but only "as far as the exclusion of males from an all-girls' educational institution is concerned." (400 F. Supp. at 341, n. 5). The Court of Appeals, however, did not accept the view that *Williams* was inapplicable here "merely because males were barred rather than females, as in the case *sub judice.*" (532 F.2d at 887).

None of the cases decided subsequent to *Williams* requires a different result herein. In no case has this Court held sex to be a suspect classification. Indeed, the Court stated: "[G]ender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin,* 416 U.S. 351, 356, n. 10 (1974). Nor has education been held to be a fundamental right requiring the strictest scrutiny. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, *reh. den.,* 411 U.S. 959 (1973).

While it may be argued that the cases of *Reed v. Reed,* 404 U.S. 71 (1971); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Kahn v. Shevin, supra; Weinberger v. Wiesenfeld,* 410 U.S. 636 (1975); and *Stanton v. Stanton,* 421 U.S. 7 (1975), have established a standard stricter than rationality in sex discrimination cases, those cases are factually dissimilar to the instant matter. As the Court of Appeals stated in distinguishing those cases:

> In each instance where a statute was struck down, the rights of the respective sexes conflicted, and those of the female were found to be inadequate. None of the cases was concerned with a situation in which equal opportunity was extended to each sex or in which the restriction applied to both. And, significantly, none occurred in an educational setting. (532 F.2d at 886).

The Court of Appeals found *Williams* consistent with *Reed,* since the restrictive admission policies in *Williams* applied to both sexes, and did not offer one sex a preferential posture as did the statute at issue in *Reed.* The Court of Appeals held that this distinction was enough to justify the use of the rational relationship test in *Williams*, and in the case at bar. (532 F.2d at 887).

This Court has recently applied the "rational relationship" test in sustaining congressional legislation recognizing that men and women were not similarly situated with regard to promotions in the Navy and which, for that reason, provided a longer period of tenure for women officers. *Schlesinger v. Ballard,* 419 U.S. 498, *reh den.,* — U.S. —, 95 S.Ct. 1363, 43 L.Ed 2d 446 (1975).

Even using a stricter or "substantial relationship" test, the Court of Appeals found the School District's policy to meet constitutional standards:

> The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship. (532 F.2d at 887-88).

Importantly, the decision of the appellate court recognizes a basic tenet of this Court that "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members . . . ." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). The Court of Appeals noted the importance of allowing educators the ability to follow "respected educational methodology," while leaving to the courts the question of the constitutionality, not desirability, of a particular pedagogical method. (532 F.2d at 888). As the Court stated in *Williams:*

> After all, flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned. (*Williams v. McNair*, *supra*, at 138.)

Indeed, this Court has recognized and has repeatedly stated that educational questions are best left to educators and local school boards. *San Antonio School District v. Rodriguez, supra*, at 42. In permitting the School District in this case to choose differing methodology in providing an equal education to all students, the Court of Appeals is completely consistent with Supreme Court decisions recognizing the importance of local control over education. As was recently stated:

> No single tradition in public education is more deeply rooted than local control . . . [it has] long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. (*Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)).

This Court has emphasized the importance of local control over the education process in providing citizens the opportunity to participate in the decision-making process, structuring school programs to fit local needs and encouraging "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio School District v. Rodriguez, supra*, at 509.

Both the Court of Appeals and the District Court dismissed petitioners, argument based on *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Sweatt v. Painter*, 339 U.S. 629 (1950). The Court of Appeals found these cases to be inapplicable since race, but not sex, is a suspect classification. The court stated:

> We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law. (532 F.2d at 886).

The District Court held that the fact of a substantially equal education at Girls High School took the case out of the realm of *Brown*. Indeed, the court expounded on the inapplicability of *Brown:*

> We reject plaintiff's argument that, given Central's long history, prestige, and long list of notable graduates, the exclusion of women from Central creates a sense of inferiority in Philadelphia's female students which rises to the level of a constitutional deprivation. While the sociological evidence which underlay Brown's finding of inferiority has not been free from challenge, there is no evidence in the present case that such a feeling of inferiority exists. (400 F. Supp. at 334, n. 1).

II. The Decision of the Court of Appeals Is Consistent With the Laws of the United States.

The specific congressional statute dealing with admissions to schools on the basis of sex is Public Law 92-

318, Title IX, §901 (1972), as amended, 20 U.S.C. §1681, et seq. That law states:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education; (20 U.S.C. §1681(a)(1))

Thus, in the statute drafted to deal specifically with *admissions* to school, the law applies "to only specified types of educational institutions and excludes from its coverage the admission policies of secondary schools." (532 F.2d at 883).

The question in the matter before this Court concerns the admissions policy of the School District. Petitioner states that "her application *for admission* to Central High School was rejected." (Petition at page 6 (emphasis supplied)). Since the law excludes the admissions policies of secondary schools from its coverage, the School District has committed no statutory violation.

Even assuming, for purposes of discussion, that the School District's policy is in the nature of an "assignment" to school, the School District has violated no law. The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-58, the Act dealing with assignment to schools, does not prohibit a school district from segregating schools on the basis of sex, although there is a specific proscription on segregation based on race, color or national origin. (20 U.S.C. §1703(a); 532 F.2d at 884).

Furthermore, the School District is in compliance with congressional policy as established by the Act that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." (20 U.S.C. §1701(a)(1)). It is clear that in the instant case Petitioner was afforded an "equal educational opportunity" without regard to sex, since the District Court found no inequality in opportunity for education between Central High School and Girls High School. (532 F.2d at 885). The Statute does not prohibit a school district from educating the sexes separately, if equal educational opportunity is provided.

It should be noted that the Statute encourages the "neighborhood" as the "appropriate basis for determining public school assignments." (20 U.S.C. §1701 (a) (2)). Petitioner did, in fact, attend her neighborhood school, George Washington High School.

If single-sex schools which provide equal educational opportunity to both sexes are to be eliminated by congressional action, that action has not, as yet, occurred. (532 F.2d at 885).

III. Since the Issue Herein Has Become Moot, There Is No Longer a "Case or Controversy" for This Court to Determine.

The named plaintiff, Susan Lynn Vorchheimer, was an eleventh grader at the completion of the last school term in June, 1976. As she stated in an affidavit accompanying a *Motion to Dissolve Stay Pending Appeal*, she was qualified for early admission to college at the end of the eleventh grade. (532 F.2d at 882, n. 5). She has been accepted at colleges, including the University of Pennsylvania and Brandeis University. Subsequent to the decision of the Court of Appeals, her father, Bert Vorchheimer, stated that she would skip her last year of high school so

she could enter college in the fall under an early admission program. (Philadelphia Inquirer, March 18, 1976.) A case or controversy therefore no longer exists between the named plaintiff and the School District.

Although the case was styled as a "class action" in the Complaint, the class was not properly certified, as required by Rule 23 (a), (b) and (c) of the Federal Rules of Civil Procedure. A similar situation was presented to this Court in *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975). There, six students brought a class action seeking to have certain rules and regulations of the Board concerning the student newspaper declared unconstitutional and their enforcement enjoined. The named plaintiffs were or had been involved in the publication and distribution of the newspaper at the time the case was brought. In their complaint they stated that the class members were "all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." *Board of School Commissioners of the City of Indianapolis v. Jacobs, supra*, at 129.

When the matter was before this Court on certiorari, it was determined that the named plaintiffs had graduated from the Indianapolis school system. The Court held that no case of controversy then existed between the named plaintiffs and the Board. *Board of School Commissioners of the City of Indianapolis v. Jacobs, supra*, at 129. As to the class, this Court found that the District Court's attempt to certify a class did not comply with Rule 23(c)(1) and (3) of the Federal Rules of Civil Procedure. The District Court had ordered that "the remaining named plaintiffs are qualified as proper representatives of the class whose interests they seek to protect." This Court held that the class action was not properly certified, nor the class properly identified. *Board of Commissioners of the City of Indianapolis v. Jacobs, supra*, at 130.

Similarly, the District Court in the instant matter did not properly certify this action as a class action. The court did not act on Petitioners' class action motion prior to the Judgment and Order, and when the court did rule on the class action aspect of the case, it did not make the findings which Rule 23(b) of the Federal Rules of Civil Procedure requires. That rule states that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied . . . ." Rule 23(a) prerequisites are:

> (a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In neither the Order of the court enjoining the Respondents' policy in question (400 F. Supp. at 343), nor in conclusion of law number 3 dealing with the class (400 F. Supp. at 333), did the court make the findings satisfying Rule 23(a) and (b).

By not making determinations required by Rules 23(a) and (b), the court did not make a proper class action order pursuant to Rule 23(c)(1) and the action, as in the case of *Board of Commissioners of the City of Indianapolis v. Jacobs, supra*, was not properly certified. As in that case, the action is therefore moot.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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